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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

**MILWAUKEE BREWERY WORKERS' PENSION PLAN,**

*Petitioner,*

v.

**JOS. SCHLITZ BREWING COMPANY and THE STROH BREWERY COMPANY,**

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Whether, pursuant to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), an employer withdrawing from a multiemployer defined benefit plan is required to make payments to the plan which include interest on the amount of the employer's allocable share of the plan's unfunded vested benefits for the full year from a) the date MPPAA directs the plan use to calculate the amount of the unfunded benefits allocable to that employer to b) the date MPPAA directs the plan to presume, for the purpose of determining the number of level annual payments necessary to amortize such amount, that the employer will make its first payment.

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**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR PETITIONER

Petitioner, Milwaukee Brewery Workers' Pension Plan ("Plan"), respectfully submits this Brief urging reversal of the judgment of the United States Court of Appeals for the Seventh Circuit rendered on August 13, 1993.

## OPINIONS BELOW

Pursuant to section 4221(a)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1401(a)(1) (1985), the parties initially submitted to arbitration their dispute relating to the amount of the Jos. Schlitz Brewing Company's ("Schlitz")[1] withdrawal liability. The arbitrator issued his Award and Opinion on July 7, 1988. It is reported at 9 Employee Benefits Cas. (BNA) 2385 (1988) and is included in the Appendix submitted with the Petition for Writ of Certiorari ("P.A.") as Exhibit E. The arbitrator issued his Final Award on August 24, 1988. It is not reported. The Final Award is included in P.A. as Exhibit F.

The United States District Court for the Eastern District of Wisconsin ("District Court") rendered a series of orders and opinions. On June 6, 1991, the District Court issued a decision and order confirming in part and vacating and modifying in part the arbitrator's Final Award. Based upon that decision and order, judgment was entered on June 6, 1991. The June 6, 1991 decision and order is unpublished. It is included in the Joint Appendix ("J.A.") at 25. On June 3, 1992 and October 20, 1992, the District Court issued orders disposing of issues raised by the Plan's timely Motion to Amend Judgment filed under Rule 59(e) of the Federal Rules of Civil Procedure. In these orders the

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[1] In accordance with Rule 14.1(b) of the United States Supreme Court, all parties to the proceeding in the Seventh Circuit appear in the caption of this case. Subsequent to the time it withdrew from the Plan, the Stroh Brewery Company acquired Schlitz and assumed its liability to the Plan. In addition to the Respondents, the Miller Brewing Company ("Miller") and Pabst Brewing Company ("Pabst") were participating employers in the Plan. All participants in the Plan are members of United Auto Workers Local No. 9, A.F.L.-C.I.O. For purposes of clarity, the Plan will refer only to Schlitz in this Brief.



District Court quantified Respondents' additional liability to the Plan and awarded the Plan pre-judgment and post-judgment interest on Respondents' additional liability. The June 3, 1992 order is not reported. It is included in the P.A. as Exhibit C. The October 20, 1992 order is not reported. It is included in the P.A. as Exhibit D.

The opinion from the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") is reported at *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir. 1993). It is included in the P.A. as Exhibit A.

## JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 (1992), 9 U.S.C. § 9 (1991) and 29 U.S.C. § 1401(b)(3) (1991) to review the arbitrator's Final Award. Within 30 days after the arbitrator's Final Award, on August 29, 1988, the Respondents filed a complaint seeking confirmation of the Arbitrator's Award. The Plan filed a counterclaim asking that the Award be vacated and modified. The District Court entered judgment on June 6, 1991. On June 20, 1991, the Plan filed a timely Motion to Alter or Amend Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Through orders issued June 3, 1992 and October 20, 1992, the District Court disposed of issues raised in the Rule 59(e) Motion. Although the District Court did not enter a new judgment, the Seventh Circuit found it had jurisdiction because the parties had waived that requirement. *See Bankers Trust Co. v. Mallis,* 435 U.S. 381 (1978).

The Plan filed a timely Notice of Appeal on November 17, 1992; Respondents filed a Notice of Cross-Appeal on November 25, 1992. The Seventh Circuit had jurisdiction

pursuant to 28 U.S.C. § 1291 (1992). The Seventh Circuit issued its opinion on August 13, 1993.

On November 12, 1993, in accordance with Supreme Court Rules 13, 14 and 29, the Plan filed a timely Petition for Writ of Certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1993). On June 27, 1994, this Court granted the Plan's Petition for Writ of Certiorari limited to Question 1 presented in the Petition.

## STATUTES INVOLVED

Section 4219(c)(1)(A) of ERISA, as amended, 29 U.S.C. § 1399(c)(1)(A) provides as follows:

> **(1)(A)(i)** Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).
>
> (ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

The following statutes are contained in the P.A. as Exhibit G and pursuant to Supreme Court Rule 26.1 have not been re-printed: Section 4211 of ERISA, as amended; 29 U.S.C. § 1391. P.A. at E-1. Section 4221 of ERISA, as amended; 29 U.S.C. § 1401. P.A. at G-17.



## STATEMENT OF CASE

The dispute between the Plan and Schlitz originated in late 1981 when Schlitz objected on numerous bases to the Plan's calculation of Schlitz' withdrawal liability. The dispute has now evolved into a single issue. In section 4211 of ERISA, as amended, 29 U.S.C. § 1391, Congress instructs multiemployer plan fiduciaries to determine the amount of unfunded vested benefits allocable to a withdrawing employer based on the plan's total unfunded vested benefits and on the value of the plan's assets as of the last day of the plan year preceding withdrawal. In section 4219(c)(1)(A)(i),[2] Congress requires a withdrawing employer to make payments to the plan over the period of years necessary to amortize the amount of the withdrawing employer's allocable share of the plan's unfunded vested benefits in level annual payments calculated **as if** the first payment were made on the first day of the plan year following the year in which the withdrawal occurs. 29 U.S.C. § 1399(c)(1)(A)(i). Section 4219(c)(1)(A)(ii) provides that determination of the amortization period shall be based upon the assumptions used for the most recent actuarial valuation for the plan. 29 U.S.C. § 1399 (c)(1)(A)(ii).

The Plan asserts that section 4219(c)(1)(A) requires Schlitz to make payments which include interest on the amount of the unfunded vested benefits allocated to Schlitz from December 31, 1980, the date used to calculate that amount until the amount is amortized fully in level annual

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[2] Except as otherwise noted, references to specific sections of a statute are references to that section in ERISA, as amended by MPPAA.

payments. Schlitz objected to paying any interest on the amount of unfunded vested benefits allocated to it before the date when Congress instructed the Plan to presume Schlitz would make its first payment—January 1, 1982. The arbitrator and the Seventh Circuit agreed with Schlitz. The District Court, however, concluded that the Plan should include interest for the entire period beginning with the date used to determine the amount of unfunded vested benefits through the date the amount is fully paid.[3] In this case, the Solicitor General has endorsed the Plan's reading

[3] The Fourth Circuit agrees with Schlitz, the arbitrator and the Seventh Circuit. *Borden, Inc. v. Bakery & Confectionery Union & Indus. Int'l. Pension*, 974 F.2d 528 (4th Cir. 1992). The Third Circuit concurs with the Plan and the District Court. *Huber v. Casablanca Indus. Inc.*, 916 F.2d 85 (3d Cir. 1990). *But in Colteryann Dairy, Inc. v. Western Pennsylvania Teamsters Fund*, 16 Employee Benefits Cas. (BNA) 2100, 2104 (W.D. Pa. 1993), the court cited *Huber* as permitting the plan to include interest only for the period from withdrawal to the presumed first payment date. This case was affirmed without opinion. *Colteryann Dairy, Inc. v. Western Pennsylvania Teamsters and Employees Pension Fund*, 8 F.3d 10 (3d Cir. 1993). A careful reading of *Huber* confirms that the court held a withdrawing employer is required to pay interest for the full year between the date used for calculating the amount of unfunded benefits and the date the presumed first payment is made. The court did not allow additional interest for the period from the presumed first payment to the date the actual payment was made. *Huber*, 916 F.2d at 99. The reported arbitration decisions on this issue are also split. *See Lommis Armored, Inc. v. Central States Pension Fund*, 8 Employee Benefits Cas. (BNA) 1899, 1921 (1987) (interest for full year of withdrawal allowed); *Carnation Co., Inc. v. Central States Pension Fund*, 9 Employee Benefits Cas. 1409, 1448 (1988) (no interest permitted before date of withdrawal); *Du Art & Technicolor v. Motion Picture Local 702 Pension Fund*, 10 Employee Benefits Cas. 1317 (1987) (interest for full year included); *The Sherwin Williams Co. v. New York State Teamsters Conference Pension and Retirement Fund*, 17 Employee Benefits Cas. 2725 (1994) (no interest before presumed first payment date).



of the provision at issue. Brief for the United States As *Amicus Curiae*, at 16-20.

The facts relevant to this issue are essentially undisputed. To place this issue in context, the Plan will: (1) review the relevant terms of the Plan; (2) discuss the evolution of the federal statutes which have been enacted to address the problems with the funding of defined benefit plans, particularly multiemployer plans; (3) describe the events in 1981 involving Schlitz and the Plan; (4) describe the method utilized by the Plan to determine the amount and number of Schlitz' payments to the Plan; and (5) discuss the relevant portions of the various opinions, orders and awards by the arbitrator, the District Court and the Seventh Circuit.

### 1. THE PLAN

The Plan is a multiemployer defined benefit pension plan established by an agreement dated August 16, 1954, between Brewery Workers' Local Union No. 9 D.A.L.U. (now U.A.W.), A.F.L.-C.I.O. (Local 9) and several companies which had operations located in or near Milwaukee, Wisconsin engaged in the production and sale of beer. (Statement of Facts at ¶ 2, 5, 6; P.A. at E-3).[4] The Plan, which was amended in its entirety on June 1, 1979, provides certain specified benefits to employees of any employer in the bargaining unit. (Plan Ex. 64; J.A. at 97-124).[5] Length of service dictates the qualifications for and amount of

[4] The parties submitted a Stipulated Statement of Facts to the arbitrator which was included in the arbitrator's Opinion and Award (P.A. at E-3).

[5] The Exhibits were introduced before the arbitrator. The Exhibits were made part of the record before the District Court and the Seventh Circuit.

benefits earned under the Plan. (Plan. Ex. 64; J.A. at 86-97). The Plan is administered by a joint committee made up of representatives from Local 9 and each contributing employer. (Plan Ex. 64; J.A. at 136).[6]

The Plan required participating employers such as Schlitz to make regular contributions to a fund to provide the benefits set forth in the Plan. (Plan Ex. 64; J.A. at 126). The employers did not guarantee that the fund would be sufficient to pay for the benefits but represented that they believed the fund would meet the full current costs and amortize original past service costs on a level funding basis over a period of 30 years from the date the past service costs were incurred. (Plan Ex. 64; J.A. at 126). Under the Plan, Schlitz agreed to contribute to the fund such amounts as it became obligated to contribute from time to time under a collective bargaining agreement with Local 9 but in no event less than the minimum contribution required by ERISA. (Plan Ex. 64; J.A. at 126). Schlitz was required to make monthly contributions to the Plan within the first ten business days of the month following any month in which Schlitz paid wages to employees covered by the Plan. (Plan Ex. 64; J.A. at 126).[7]

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[6] The parties stipulated that in October 1958, Schlitz was a member of the Milwaukee Brewers' Association ("Association"). (Statement of Fact at 6, 9; P.A. at E-3). The Association was formed to prepare and negotiate collective bargaining agreements with various labor organizations, including Local 9. (Statement of Facts at 7; P.A. at E-3). Although the Association initially had six employer members, by January 1, 1981, only Schlitz, Miller and Pabst remained as members of the Association and continued to contribute to the Plan.

[7] Under the terms of the collective bargaining agreement effective from June 1, 1979 to June 1, 1981, Schlitz agreed to pay to the Plan $9.344 per day for each day worked by each employee covered by the Plan until January 1, 1980, and $11.632 per day

(continued...)



## 2. FEDERAL STATUTES

When this Plan was established in 1954, there were essentially no federal statutes regulating employer sponsored pension plans. Section 302(c)(5) of the Labor Management Relations Act of 1947 required employers and employees to be equally represented in administration of a pension trust fund, that the fund be for the purpose of paying benefits to employees or their beneficiaries and that the terms be set forth in a written agreement. 29 U.S.C. § 186(c)(5) (1978). In 1954, President Eisenhower sent a message to Congress recommending that Congress initiate a thorough study of welfare and pension funds covered by collective bargaining agreements, with a view to enacting legislation to protect and conserve these funds for the millions of working men and women who are beneficiaries. After four years of hearings, studies and investigation, Congress enacted the 1958 Disclosure Act which did not regulate the plans but required annual reporting to the Labor Department. 29 U.S.C. § 301 *et seq.* (repealed by ERISA, 29 U.S.C. § 1031(a)). *See Malone v. White Motor Corp.*, 435 U.S. 497, 506 (1978) (discussing legislative process leading to 1958 Disclosure Act).

Congress continued to study problems relating to the nation's private pension plans and on September 2, 1974 it enacted ERISA. In enacting ERISA, Congress specifically found that because of a lack of vesting provisions, inadequate minimum funding standards and termination of plans

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[7] (...continued)

for each employee from January 1, 1980 to June 1, 1981. (Schlitz Ex. 1; Plan Ex. 150 at 27-28). Schlitz' required contribution to the Plan under the collective bargaining agreement was limited to $46.72 per week for each employee until January 1, 1980 and $58.16 per employee per week until June 1, 1981. (Schlitz Ex. 1; Plan Ex. 150 at 27-28).

before requisite funds had accumulated, many employees with long years of service and their beneficiaries had been deprived of anticipated benefits. 29 U.S.C. § 1001(a); *See Nachman Corp. v. Pension Benefit & Guar. Corp.*, 446 U.S. 359, 361 (1980) (discussing congressional investigation and policies). Congress declared that it was the policy of ERISA, among other things, to protect the interest of participants in private pension plans and their beneficiaries. 29 U.S.C. § 1001(c). As this Court first stated in *Nachman*: "Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement, and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." 446 U.S. at 375.[8]

Through ERISA, Congress imposes on the Plan minimum participation standards, 29 U.S.C. § 1052; minimum vesting standards, 29 U.S.C. § 1053 and minimum funding standards, 29 U.S.C. § 1082. ERISA requires the Plan to establish a funding standard account. 29 U.S.C. § 1082(b)(1). Congress directs the Plan to credit the account with certain contributions to the Plan, 29 U.S.C. § 1082(b)(3), and to charge the account with certain costs, including the normal costs of the Plan for the Plan year plus amounts necessary to amortize in equal annual installments certain unfunded liabilities for employees' past service. 29 U.S.C. § 1082(b)(2). In order to satisfy the minimum funding standard at the end of the Plan year, the Plan may not have an accumulated funding deficiency. 29 U.S.C. § 1082(A)(1). If an accumulated funding deficiency occurs, under the terms of the Plan, Schlitz and the other participating employers would be required to make additional contributions to meet the minimum funding standards required by ERISA (Plan. Ex. 64; J.A. at 126).[9]

[8] This Court has repeatedly acknowledged that protecting the employees and their beneficiaries is among the principal purposes of ERISA. *Alessi v. Raybestos - Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 721 (1984); *Central States Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 569 (1985); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 212 (1986); *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2271 (1993).



Recognizing ERISA did not achieve fully the goal of protecting participants and beneficiaries in multiemployer plans, in 1977 Congress directed the Pension Benefit Guaranty Corporation ("PBGC") to prepare a comprehensive report analyzing the problems faced by multiemployer plans and recommending appropriate legislative action. *See* S. Rep. No. 95-510 at 1-4 (1977), U.S. Code Cong. & Admin. News, 1977, at 4129; H.R. Rep. No. 95-706, at 1 (1977); *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 721 (1984). In its report issued July 1, 1978, Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214 (1978), the PBGC noted that ERISA did not adequately protect plans from the adverse consequences that resulted when individual employers terminated their participation in or withdrew from multiemployer plans. *Gray*, 467 U.S. at 722. The PBGC noted that ERISA's withdrawal liability rules failed to provide an efficient mechanism for reducing the burden of withdrawal

[9] In May, 1980, the Plan's actuary reported to the joint committee that over the past three years the funding of the Plan was rapidly approaching a violation of ERISA's funding standard regulations. (Plan Ex. 146(b) at 2). In fact, the surplus in the funding standard account had diminished from $1,414,000 in 1977 to $374,000 by 1979. (Plan Ex. 146(b) at 2). The rapid reduction in the surplus was caused by a continual decline in the number of hours for which contributions were made (Plan Ex. 146(b) at 2), and the continual increase in age and length of service of the Plan participants.

imposed on the multiemployer plan and the remaining employers. *Id.*[10]

After 17 months of debate, Congress passed the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), which the President signed into law on September 26, 1980. *See Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2272 (1993) (discussing legislative process leading to MPPAA). In enacting MPPAA, Congress specifically found that multiemployer pension plans directly affect the continued well-being and security of millions of employees, retirees and their dependents, 29 U.S.C. § 1001a(a)(3); that withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, 29 U.S.C. § 1001a(a)(4)(A); and that in a declining industry the incidence of employer withdrawals is higher and the adverse effects on the plan

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[10] This Court has previously noted the following testimony:

> A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liability generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue. Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Ways and Means, 95th Cong., 2nd Sess., 22 (1978) (Statement of Matthew M. Lind).

*Gray*, 467 U.S. at 722; *Connolly*, 475 U.S. at 216 (1986).



are exacerbated, 29 U.S.C. § 1001a(a)(4)(B). Congress declared it to be among the policies of MPPAA to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans and to provide a financially self sufficient program for the guarantee of benefits under multiemployer plans. 29 U.S.C. § 1001a(c)(3) and (4). The clear intent and purpose of MPPAA is to protect the plan and its remaining employers. *Laborers Health and Welfare Trust Fund for Northern Cal. v. Advance Lightweight Concrete Co., Inc.*, 484 U.S. 539, 545 (1988).

In an effort to address these concerns and further the declared policies, Congress provided in MPPAA that if an employer withdraws from a multiemployer plan, then the employer is liable to the plan in the amount determined to be its withdrawal liability. 29 U.S.C. § 1381(a). Withdrawal liability is the amount determined in accordance with section 1391 of MPPAA to be the withdrawing employer's share of the plan's unfunded vested benefits (with certain adjustments when applicable). 29 U.S.C. § 1381(b). When an employer withdraws from a multiemployer plan, the plan sponsor is to determine the amount of the employer's withdrawal liability, notify the employer of the amount and collect it from the employer. 29 U.S.C. § 1382.

An employer completely withdraws from a plan on the date it permanently ceases to have an obligation to contribute under the plan and applicable labor-management relations laws, or permanently ceases all covered operations under a plan. 29 U.S.C. §§ 1383(a) and 1382(e). MPPAA instructs the plan how to calculate the amount and number of annual payments a withdrawing employer is required to make. 29 U.S.C. § 1399. "In essence, the withdrawal liability imposes on the withdrawing employer a share of the unfunded vested liability proportional to the employer's

share of contributions to the plan during the years of its participation." *Concrete Pipe & Prods., Inc.*, 113 S.Ct. at 2273.

### 3. 1981 EVENTS INVOLVING SCHLITZ AND THE PLAN

On January 21, 1981, Schlitz notified Miller, Pabst and Local 9 that it had withdrawn from the Association and would bargain separately with Local 9. (Statement of Facts at ¶ 29; P.A. at E-7). On March 9, 1981, Schlitz notified Local 9 that it desired to terminate or modify the existing agreement between the parties. (Statement of Facts at ¶ 32; P.A. at E-7). The collective bargaining agreement expired on May 31, 1981. (Statement of Facts at ¶ 36, P.A. at E-8). Local 9 went on strike against Schlitz on June 1, 1981. (Statement of Facts at ¶ 37; P.A. at E-8).[11] On July 31, 1981, Schlitz announced it was permanently closing its Milwaukee plant and on August 14, 1981, the Schlitz representative resigned from the Plan's joint committee (Statement of Facts at ¶ 38, 39; P.A. at E-8; J.A. at 151-52).

### 4. PLAN'S CALCULATION OF SCHLITZ' WITHDRAWAL LIABILITY

On August 17, 1981, the joint committee directed the Plan's actuary to calculate Schlitz' withdrawal liability. (Statement of Facts at ¶ 51; P.A. at E-9). When an employer withdraws, MPPAA requires the plan's actuary to determine the present value of the plan's liability for vested

[11] Prior to May 31, 1981, Miller and Pabst reached a new collective bargaining agreement with Local 9. (Statement of Facts at ¶ 48; P.A. at E-9). Schlitz is the first and only employer to withdraw from this Plan since MPPAA was enacted.



benefits. *See Concrete Pipe & Prods., Inc.*, 113 S.Ct. at 2273. Section 4201 provides several alternate methods to determine the amount of unfunded vested benefits allocable to a withdrawing employer. 29 U.S.C. § 1391. Under each of these methods the withdrawing employer is allocated a portion of the present value of the plan's unfunded vested benefits and assets as of the last day of the plan year prior to the year in which the withdrawal occurs. Here, the joint committee instructed the Plan's actuary to calculate Schlitz' liability under the method provided in section 4201(c)(4)(D)(i). (Statement of Facts at ¶ 51; P.A. at E-9; Schlitz Ex. 46). This method is described as the direct attribution method because it allocates to a withdrawing employer the portion of unfunded vested benefits directly attributed to the participant's service to that employer.

Schlitz withdrew from the plan in 1981. Using the direct attribution method, the Plan's actuary determined that the value of the Plan's total vested benefits as of December 31, 1980 was $162,241,897. (Schlitz Ex. 92). The Plan's actuary further determined that the Plan had total assets as of December 31, 1980 of $51,226,568. (Schlitz Ex. 92). Thus, as of December 31, 1980, the Plan had unfunded vested benefits in the amount of $111,015,329. (Schlitz Ex. 92). The Plan's actuary calculated that under the direct attribution method 36.96% of these unfunded vested benefits was attributable to Schlitz. Thus, the Plan's actuary calculated that Schlitz' allocable share of unfunded vested benefits as of December 31, 1980 was $41,031,406 (Schlitz Ex. 92).[12]

[12] Section 4201(b) defines an employer's withdrawal liability as the amount determined under section 1391 to be allocable to that employer adjusted by certain amounts, if applicable. 29 U.S.C. § 1381(b). In this case, none of the adjustments required by section 4201 applied to the amount of unfunded benefits allocable to Schlitz. Thus, Schlitz' withdrawal liability, as defined in section

(continued...)

However, under MPPAA, Schlitz was not required to pay the Plan the entire amount of its allocable unfunded vested benefits in a lump sum. Instead, in section 4219(c), Congress provided a detailed method for determining the number and amount of annual payments a withdrawing employer is required to make. As the first step in establishing a payment schedule, section 4219(c) requires a plan to determine the amount of each annual payment based upon the average of the employer's three consecutive highest contribution rates during the ten years ending before the plan year in which withdrawal occurs. 29 U.S.C. § 1399(c)(1)(C). Based upon the instructions in section 4219(c), the Plan's actuary calculated Schlitz' annual payment as $3,945,481. (Transcript of Proceedings before Arbitrator, Volume V at 689).

In section 4219(c)(1)(A)(i), Congress further dictates that an employer shall pay the amount determined under section 1391 adjusted in accordance first with section 1389 and then section 1386[13] over the period of years necessary to amortize the amount in level annual payments calculated **as if** the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and **as if** subsequent payments are made on the first day of each subsequent plan year. 29 U.S.C. § 1399(c)(1)(A)(i). The determination of the amortization period must be based on the same assumptions used for the

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[12] (...continued)
4201(b) and as originally calculated by the Plan's actuary, was $41,031,406.

[13] Section 1389 provides for a reduction in the amount calculated under § 1391 when the amount is *de minimis*. Section 1386 provides for a reduction in the amount calculated under § 1391 when a partial withdrawal has occurred. Schlitz was not entitled to a reduction under either section.



most recent actuarial valuation for the plan. 29 U.S.C. § 1399(c)(1)(A)(ii). Thus, to determine the number of annual payments, Congress instructs the plan's actuary to construct a hypothetical or presumed payment schedule with the first payment made one year after the date used to determine the amount of unfunded vested benefits.

As section 4219(c)(1)(A)(ii) instructs, in calculating the amortization period, the Plan's actuary used a 7% interest rate based upon the assumptions used in the most recent actuarial valuation.[14] In order to determine the period of years necessary to amortize the amount of unfunded vested benefits allocable to Schlitz, the Plan's actuary assessed interest at 7% from December 31, 1980, the date MPPAA instructs the actuary to use to initially determine the amount of the Plan's unfunded vested benefits allocated to Schlitz. The Plan's actuary determined that, at a 7% interest rate, in order to amortize fully the $41,031,406 in unfunded vested benefits allocable to Schlitz, annual payments would have extended to the year 2001.

On September 29, 1981, the joint committee sent a letter to Schlitz demanding payment of $41,031,406. (Statement of Fact at ¶ 53; P.A. at E-9). Section 4219(c)(3) permits each annual payment to be made in four equal installments due quarterly. 29 U.S.C. § 1399(c)(3). MPPAA does not authorize the Plan to charge additional interest to reflect the fact that the annual payment is not actually paid in full on the first day of the plan year. However, if the quarterly payments are not made when due, interest accrues on the late payments from the due date to the payment date. 29 U.S.C. § 1399(c)(3). The withdrawing employer is required to begin

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[14] Although Schlitz initially objected to the use of this interest rate, that objection was abandoned following the arbitration proceedings in this case.

payment not later than 60 days after the date of the demand, notwithstanding any request for review or appeal. 29 U.S.C. § 1399(c)(2). Thus, Schlitz' first quarterly payment was due on November 1, 1981. In accordance with section 4221(d), Schlitz began making the quarterly payments while contesting the amount of its liability. 29 U.S.C. § 1401(d).

### 5. REVIEW OF THE PLAN'S CALCULATIONS

#### A. ARBITRATION

After initially requesting additional information from the Plan and notifying the Plan that it disputed the amount of its withdrawal liability, on March 19, 1981, pursuant to section 4221(a)(1), Schlitz requested arbitration of the dispute. 29 U.S.C. § 1401(a)(1). The parties submitted numerous issues to the arbitrator. After hearing testimony and entertaining arguments the arbitrator, among other things, concluded that Schlitz' withdrawal liability should have been calculated under the presumptive method found in section 4211(b), 29 U.S.C. § 1391(b), rather than the direct attribution method utilized by the Plan. (P.A. at E-28). Like the direct attribution method, the presumptive method requires the Plan to use the amount of the unfunded vested benefits as of December 31, 1980, the end of the Plan year preceding Schlitz' withdrawal, to determine Schlitz' allocable share of those unfunded vested benefits. 29 U.S.C. § 1391(b). But the arbitrator also concluded that MPPAA did not provide for interest on the amount for the period from the date used to calculate Schlitz' allocable share of unfunded benefits to the date which, for purposes of establishing a payment schedule, the first payment is presumably made. (P.A. at E-40).



Although the Plan did not agree with and continues to seek review of the arbitrator's rulings, the parties did agree that, based upon those rulings, Schlitz' withdrawal liability was reduced from $41,031,406 to $23,300,000. The amount of Schlitz' annual payment calculated under section 4219(c)(1)(C) remained unchanged and, therefore, the quarterly payments continued to be $986,370. However, based upon the arbitrator's Award, the number of quarterly payments was reduced from 78 to 29. (P.A. at F-5). By the time the arbitrator issued his Final Award on August 24, 1988, only the final quarterly payment remained to be paid pursuant to his Final Award. It was due on November 1, 1988, in the amount of $880,331. Schlitz made this payment.

#### B. DISTRICT COURT

Schlitz filed a complaint in the District Court seeking confirmation of the arbitrator's Final Award as permitted by section 4221(b)(2). 29 U.S.C. § 1401(b)(2). The Plan filed a counterclaim seeking to vacate and modify the arbitrator's Final Award. On June 6, 1991, the District Court confirmed the arbitrator's Final Award on all issues except for the exclusion of interest on the amount of the unfunded vested benefits allocated to Schlitz for the period from December 31, 1980 to January 1, 1982. The District Court held that by directing the employer to make sufficient payments to amortize in level annual payments the amount of its allocable unfunded vested benefits, MPPAA requires the withdrawing employer to pay interest on the amount from the date used to calculate that amount (J.A. at 62-69).

The District Court entered judgment confirming in part and vacating in part the arbitrator's Final Award. The Plan filed a timely Motion under Rule 59(e) of the Federal Rules of Civil Procedure asking the District Court to quantify the

amount of Schlitz' additional liability to the Plan and to award pre-judgment interest. On June 3, 1992, the District Court ordered that the Plan was entitled to pre-judgment interest and directed the parties to confer in an effort to quantify the amount of Schlitz' additional liability according to the court's rulings. (P.A. at C-1).

The parties could not agree on all elements of the calculation. Finally, on October 20, 1992, the District Court found that Schlitz should have been assessed with an additional $1,631,000 which represented interest on the $23,300,000 in unfunded vested benefits allocated to Schlitz, calculated at 7% for the period between December 31, 1980 and January 1, 1982. (P.A. at D-2). The District Court further found that had the arbitrator not erroneously excluded interest for that period, Schlitz would have been required to make additional payments of $106,039 on November 1, 1988; $986,370 on February 1, 1989; $986,370 on May 1, 1989; and $540,262 on August 1, 1989. (P.A. at D-4). While continuing to contest the decision, the parties agreed that under the arbitrator's Award, as modified by the District Court, Schlitz would have been required to make these additional payments. (P.A. at D-2). The District Court then determined that the Plan was entitled to pre-judgment interest at the prime rate calculated from the dates on which Schlitz should have made the additional payments until June 6, 1991, when the District Court entered its judgment. (P.A. at D-4, D-5). This increased Schlitz' liability to $3,221,371 as of June 6, 1991. The District Court awarded post-judgment interest pursuant to



28 U.S.C. § 1961 from June 6, 1991 until the date Schlitz satisfied its additional liability. (P.A. at D-5, D-8).[15]

### C. SEVENTH CIRCUIT

The Plan filed a timely Notice of Appeal from the District Court's judgment and orders. Schlitz filed a Notice of Cross-Appeal. The Plan asked the Seventh Circuit to reverse the District Court's judgment as it related to the Plan's use of the direct attribution rather than the presumptive method for calculating Schlitz' liability. In its appeal, Schlitz asked the Seventh Circuit to reverse the District Court's decision relating to the additional interest or, in the alternative, to vacate the District Court's award of pre-judgment interest. The Seventh Circuit affirmed the District Court on the issue of the method utilized for calculating the amount of unfunded vested benefits allocable to Schlitz and reversed the District Court on the issue of interest assessed on this amount before the first payment was presumed to be made. (P.A. at A-15-18).[16] The Seventh Circuit held that MPPAA did not authorize the Plan to

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[15] In accordance with § 4221(d) of MPPAA, and based upon the District Court's orders, Schlitz paid the Plan $3,424,150, the amount of Schlitz' additional liability plus pre-judgment and post-judgment interest as awarded by the District Court.

[16] The Plan argued that when Schlitz reserved for itself the right to select from among the various methods Congress authorized for calculating the amount of unfunded vested benefits allocable to a withdrawing employer, Schlitz was engaged in a fiduciary function and, therefore, required to select the method which was in the best interest of the Plan rather than the method which was in the best interest of Schlitz. The Seventh Circuit rejected this argument. Because some of this Court's observations in *Concrete Pipe & Prods. Inc.*, 113 S.Ct. at 2264, support the Plan's argument, the Plan also asked this Court to review that portion of the Seventh Circuit's opinion. However, this Court granted the Petition for Writ of Certiorari limited to Question 1.

include interest for the full year between the dates used to calculate the amount of unfunded vested benefits allocable to Schlitz and the date when, for purpose of determining the payment schedule, the first payment is presumed to be made. (P.A. at A-18). It left open the possibility that MPPAA might permit the Plan to include interest for some portion of that year-long period. The Seventh Circuit instructed the District Court to vacate its judgment and enter a judgment enforcing the arbitrator's Final Award in its entirety. (P.A. at A-18). Following the Seventh Circuit's decision, the Plan returned to Schlitz $3,587,936.46, the amount of Schlitz' overpayment according to the Seventh Circuit's opinion plus interest as required by section 4221(d) of MPPAA. 29 U.S.C. § 1401(d).

## SUMMARY OF ARGUMENT

In section 4219(c)(1)(A)(i), Congress instructed the Plan to construct a presumed payment schedule in order to determine the number of payments Schlitz was required to make. The issue in this case turns on whether Congress intended for the first payment in the presumed payment schedule to be devoted entirely to reduce the amount of unfunded vested benefits allocated to Schlitz or whether a portion of that payment should be attributed to interest on that amount calculated from the date used to determine the amount of vested benefits allocated to Schlitz. Congress directs a withdrawing employer to make level annual payments sufficient to **amortize** the amount of its allocable share of the Plan's unfunded vested benefits calculated **as if** the first payment is made on the first day of the plan year following the withdrawal. 29 U.S.C. § 1399(c)(1)(A)(i).

As in any case involving a dispute over the meaning of a statute, the starting place is the text of the statute itself. There is no dispute that, at least with respect to every payment in the presumed payment schedule after the first payment, a portion of the payment is devoted to interest accrued on the amount allocated to Schlitz. Congress did not expressly exclude an interest component from the first payment in the presumed payment schedule. Instead, Congress required sufficient annual payments to "amortize" the amount. Because Congress did not direct that the first payment in the presumed payment schedule be treated any differently from the other payments, amortization of the amount requires the first payment in the presumed schedule to include interest.



To the extent there is any perceived ambiguity in the text of this section, the purpose, language and design of MPPAA and ERISA as a whole dictate that the ambiguity be resolved in favor of protecting the Plan, its participants and beneficiaries. Moreover, to interpret the section as urged by Schlitz violates a cardinal rule of statutory construction because it would render meaningless language used by Congress. Finally, the legislative histories of MPPAA and ERISA in general, and of section 4219(c)(1)(A)(i) in particular, confirms that Congress intended to require a withdrawing employer to pay interest on the amount of unfunded vested benefits allocated to the employer from the date used to calculate the amount of benefits to the date the full amount is paid.

## ARGUMENT

### I. THE PLAIN LANGUAGE OF SECTION 4219(c)(1)(A)(i) REQUIRES SCHLITZ TO MAKE ADDITIONAL PAYMENTS IN ORDER TO AMORTIZE FULLY THE AMOUNT OF UNFUNDED VESTED BENEFITS ALLOCATED TO SCHLITZ.

The Plan asserts that section 4219(c)(1)(A)(i) of ERISA required Schlitz to make additional quarterly payments to

the Plan totaling $2,619,041.[17] Schlitz argues that this provision does not require it to make any additional payments. As this Court has stated repeatedly, when the dispute involves the application or interpretation of a statute, the Court's analysis begins with the text of the statute. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2594 (1992); *Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992). When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning in all but the most extraordinary circumstances is complete. *Id.* Section 4219 (c)(1)(A)(i) provides:

> Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

29 U.S.C. § 1399(c)(1)(A)(i).

In this section, Congress unambiguously provided the method for determining the number of payments a withdrawing employer is required to make to the plan. Congress

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[17] There is no dispute that when the presumptive method and the actuarial assumptions accepted by the arbitrator are used, the amount of the Plan's unfunded vested benefits as of December 31, 1980 allocable to Schlitz was $23,300,000. There is also no dispute that Schlitz' annual payment pursuant to section 4219(c) was correctly calculated as $3,945,481.



instructed withdrawing employers to make payments over the number of years necessary to amortize the amount of the plan's unfunded vested benefits allocated to it in level annual payments. Significantly, Congress specifically directed that the period of years over which payments are required shall be "calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year." 29 U.S.C. § 1399(c)(1)(A)(i). Immediately following that instruction, Congress noted that actual payments would commence in accordance with paragraph (2), which requires that the first payment be made no later than 60 days after the date of demand. 29 U.S.C. § 1399(c)(2).

The plain language of the section demonstrates that Congress intended that the calculation of the period of years necessary to amortize the amount be based on a presumed payment schedule that did not depend upon when payments were actually due or made. Congress could not have been more explicit. Based upon the direction in section 4219(c)(1)(A)(i), the presumed payment schedule is used to calculate the period over which Schlitz was required to make payments to the Plan. Moreover, Congress provided for interest to be included in such payments at the same rate utilized by the Plan in its most recent actuarial valuation, in this case 7%. 29 U.S.C. § 1399(c)(1)(A)(ii). Under the presumed schedule, Schlitz' first payment is presumed made on January 1, 1982.

Schlitz has not argued that none of the payments in the presumed schedule should be attributable in part to accrued interest. Rather, the dispute in this case is whether the first payment in the presumed schedule is solely used to reduce the amount of unfunded vested benefits allocated to

Schlitz or whether it constitutes a payment partially attributable to such amount and partially attributable to interest on that amount. As the District Court correctly concluded, the plain meaning of the term "amortize" resolves the remaining dispute. (J.A. at 67).

Congress did not define "amortize" in ERISA or MPPAA. When Congress does not specifically define a term, the Court normally construes it in accordance with its ordinary or natural meaning. *Smith v. United States*, 113 S.Ct. 2050, 2054 (1993); *Perrin v. United States*, 444 U.S. 37, 42 (1979). To the extent "amortize" is considered a technical word or a term of art, then the word is construed by reference to the art or science involved. *Brennan v. Corning Glass Works*, 417 U.S. 188, 201 (1974). In this case, the ordinary or natural meaning of "amortize" has become the one derived from its use as an accounting or actuarial term of art.[18]

Indeed, each of the following definitions recognizes that all payments in an amortization schedule include accrued interest. Webster's Dictionary defines "amortize" as follows:

> 1) Law: to alienate in mortmain <amortized the estate>. . . 2) Accounting - a: To provide for the gradual extinguishment of (an obligation, as a mortgage or bond issue) by payment of a part of the principal or by contribution to a sinking fund usually with or at the time of each periodic interest payment.

Webster's Third New International Dictionary Unabridged 72 (1981). Black's Law Dictionary defines "amortization" as follows:

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[18] When attempting to determine the ordinary or natural meaning of terms used in a statute, this Court has previously looked to definitions contained in widely used dictionaries. *Smith*, 113 S.Ct. at 2054.



> The allocation (and charge to expense) of the cost or other basis of an intangible asset over its estimated useful life. Intangible assets which have an indefinite life (e.g., goodwill) are not amortizable. Examples of amortizable intangibles include patents, copyrights and leasehold interests. A reduction in a debt or fund by periodic payments covering interest and part of principal, distinguished from: (1) depreciation, which is an allocation of the original cost of an asset computed from physical wear and tear as well as the passage of time, and (2) depletion, which is a reduction in the book value of a resource (such as minerals) resulting from conversion into a salable product. The operation of paying off bonds, stock, a mortgage, or other indebtedness, commonly of a state or corporation, by installments, or by a sinking fund. An "amortization plan" for the payment of an indebtedness is one where there are partial payments of the principal, and accrued interest, at stated periods for a definite time, at the expiration of which the entire indebtedness will be extinguished.

Black's Law Dictionary 76 (5th Ed. 1979).

"If a loan is being repaid by the amortization method, each payment is partially repayment of principal and partially payment of interest." S. Kellison, *The Theory of Interest*, (2d Ed. 1991) at 169. In this case, Thomas D. Levy, a consulting actuary from Martin Segal Company, testified that "customary actuarial practice is to reflect interest for periods of time from the date of an obligation or an actuarial present value is determined to the date that it is funded." (Transcript of Proceedings Before Arbitrator, Volume VI at 789-90). Mr. Levy testified that an actuary following the instructions in MPPAA would include interest on the amount in all payments, including the first payment.

(Transcript of Proceedings Before Arbitrator, Volume VI at 791). Courts that have interpreted the term "amortize" have also repeatedly noted that the term calls for a payment of an indebtedness where there are partial payments of principal and accrued interest at stated periods for a definite time, at the expiration of which the entire indebtedness will be extinguished. *Hamilton v. BS & W*, 870 S.W.2d 436, 438 (Ky. Ct. App. 1993); *Hwa Young Yu v. Stephens*, 591 So.2d 858, 859 (Ala. 1991); *Bystra v. Federal Land Bank*, 90 S. 478 (Fla. 1921); *Brooke v. Phillips Petroleum Co.*, 149 S.E.2d 511, 514 (Ga. Ct. App. 1966).

Based upon the ordinary and natural meaning, as well as the accounting or actuarial meaning of the term "amortize," all payments, including the first payment in the presumed payment schedule must be attributable in part to the amount of the allocated share of unfunded vested benefits and in part to interest accrued on the amount. *Huber*, 916 F.2d at 997. Following Congress' instructions in section 4219(c)(A)(1)(i), the presumed payment schedule for the amount of Schlitz' allocated share of the Plan's unfunded vested benefits is as follows:

**PLAN'S UNFUNDED VESTED BENEFITS ALLOCATED TO SCHLITZ**

| DATE | AMOUNT | TRANSACTION | BALANCE |
|---|---|---|---|
| 12/31/80 | 23,300,000 | Allocated to Schlitz | 23,300,000 |
| 12/31/81 | 23,300,000 | Accrued interest 7% 1,631,000 | 24,931,000 |
| 01/01/82 | 24,931,000 | Payment (1) from Schlitz 3,945,481 | 20,985,519 |
| 12/31/82 | 20,985,519 | Accrued interest 7% 1,468,986 | 22,454,505 |
| 01/01/83 | 22,454,505 | Payment (2) from Schlitz 3,945,481 | 18,509,024 |
| 12/31/83 | 18,509,024 | Accrued Interest 7% 1,295,632 | 19,804,656 |
| 01/01/84 | 19,804,656 | Payment (3) from Schlitz 3,945,481 | 15,859,175 |
| 12/31/84 | 15,859,175 | Accrued Interest 7% 1,110,142 | 16,969,317 |
| 01/01/85 | 16,969,317 | Payment (4) from Schlitz 3,945,481 | 13,023,836 |
| 12/31/85 | 13,023,836 | Accrued interest 7% 911,669 | 13,935,504 |
| 01/01/86 | 13,935,504 | Payment (5) from Schlitz 3,945,481 | 9,990,023 |
| 12/31/86 | 9,990,023 | Accrued interest 7% 699,302 | 10,689,324 |
| 01/01/87 | 10,689,324 | Payment (6) from Schlitz 3,945,481 | 6,743,843 |
| 12/31/87 | 6,743,843 | Accrued Interest 7% 472,069 | 7,215,912 |
| 01/01/88 | 7,215,912 | Payment (7) from Schlitz 3,945,481 | 3,270,431 |
| 12/31/88 | 3,270,431 | Accrued interest 7% 228,930 | 3,499,361 |
| 01/01/89 | 3,499,361 | Payment (8) from Schlitz 3,499,361 | -0- |

Thus, following the instructions of section 4219(c)(1)(A)(i), Schlitz should have made seven annual payments of $3,945,481 and one annual payment of $3,499,361. In fact, based upon the arbitrator's decision as affirmed by the Seventh Circuit, Schlitz actually made seven annual payments of $3,945,481 and one payment of $880,331.

Schlitz has observed that section 4219(c)(1)(A)(i) is silent about whether the first presumed payment should include an interest component or should be applied to reduce fully the amount of the unfunded vested benefits allocated to it. The Fourth and Seventh Circuits have relied upon the absence of reference to "interest" in this particular section to conclude that Congress did not intend to include accrued interest in the first payment in the presumed schedule. *Borden, Inc. v. Bakery & Confectionery Union & Indus. Int'l Pension*, 974 F.2d 528, 536 (4th Cir. 1992); *Jos. Schlitz Brewing Co.*, 3 F.3d 994, 1004 (7th Cir. 1993). This argument ignores that, construed in accordance with its natural and ordinary meaning, the term "amortize" contemplates a series of regularly scheduled payments and that each payment, including the first, had an interest component. Use of the term "interest" in such context would be redundant. Thus, Congress explicitly included an interest component in the payments and was silent on exempting the first presumed payment in the schedule from accrued interest.

The Seventh Circuit held that nothing in section 4219 (c)(1)(A)(i) permitted the Plan to include as part of the first presumed payment a full year's interest on the amount of unfunded vested benefits allocated to Schlitz. Without citation to any language in the statute, the Seventh Circuit did, however, raise the possibility that Congress authorized attributing a portion of the first presumed payment to interest for some period of time less than the full year, *e.g.*, from the time of withdrawal to the date of the first payment. *Jos. Schlitz Brewing Co.*, 3 F.3d at 1004. But Congress made no distinction between interest in the pre-withdrawal and post-withdrawal period. Thus, contrary to the possibility suggested by the Seventh Circuit, the plain text of section 4219(c)(1)(A)(i) does not permit including a portion of a year's worth of interest in the presumed first payment. Congress was clear. The first and all payments in the presumed schedule must include an interest component.



## II. CONSIDERED IN THE CONTEXT OF THE ENTIRE STATUTORY SCHEME, CONGRESS CLEARLY REQUIRED SCHLITZ TO MAKE ADDITIONAL PAYMENTS TO AMORTIZE FULLY THE AMOUNT OF THE PLAN'S UNFUNDED VESTED BENEFITS ALLOCATED TO IT.

To the extent the language used by Congress in section 4219(c)(1)(A)(i) read in isolation leaves any doubt about whether the first payment in the presumed payment schedule must include interest, the Court may look to the design and structure of ERISA and MPPAA to interpret this section in context of the entire statutory scheme. *Estate of Cowart,* 112 S.Ct. at 2595; *Crandon v. United States*, 494 U.S. 152, 158 (1990). A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive result that is compatible with the rest of the law. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988). As the Solicitor General noted, when one considers that the amount which must be amortized is the amount of unfunded vested benefits which are allocated to a withdrawing employer, it is clear that Congress intended for interest to accrue on the amount from the date used to determine that amount, the last day of the plan year prior to withdrawal. Brief For The United States As Amicus Curiae at 18.

This Court has recognized that one of the primary purposes of ERISA and MPPAA articulated by Congress is to provide sufficient funding for the vested benefits which participants in pension plans have earned and anticipate receiving. 29 U.S.C. §§ 1001(c); 1001a(C)(3) and (4); *Nachman*, 446 U.S. at 375; *Alessi*, 451 U.S. at 510; *Gray*, 467 U.S. at 721; *Central States Pension Fund*, 472 U.S. at 569; *Connolly*, 475 U.S. at 212; *Concrete Pipe & Prods., Inc.*, 113 S.Ct. at 2271. ERISA and MPPAA are structured and designed with that goal in mind. MPPAA in particular was designed not to protect withdrawing employers but instead to protect the plan and those employers which continued to participate in the plan. *Laborers Health and Welfare*, 484 U.S. at 545.[19] Thus, the Court should construe section 4219(c)(1)(A)(i) in accordance with the clear purpose of ERISA and MPPAA—to protect the funding of vested benefits and to minimize the adverse impact of a withdrawal on non-withdrawing employers.

To interpret properly section 4219(c)(1)(A)(i) within the design and structure of ERISA and MPPAA, the Court should observe the concern Congress demonstrated for funding problems when it required plans to establish the funding standards account. 29 U.S.C. § 1082. Congress carefully and precisely dictated what amounts could be credited to the account and what amounts had to be charged to the account. 29 U.S.C. §§ 1082 (b)(2) and (3). The entire purpose of this detailed exercise is to attempt to ensure that the present cash value of contributions on an annual basis will be sufficient to cover the present cash

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[19] Although not one of the purposes of MPPAA, withdrawing employers are protected to a certain extent because they are not charged with the funding of benefits earned or greater underfunding problems created or arising after the end of the plan year prior to the year in which they withdraw.



value of the plan's liabilities. In fact, Congress does not allow a plan to credit its funding standards account for payments from withdrawn employers if the payment reflects advance funding for plan liabilities. 29 U.S.C. § 1082(b)(7)(A). After demonstrating such care in matching unfunded vested benefits and other costs to annual contributions in section 1082 of ERISA, Congress certainly would not have deliberately left a gap in funding of the portion of unfunded vested benefits that is allocated to a withdrawing employer.

Schlitz has argued that it is not fair to impose any interest on the unfunded benefits for the period between December 31, 1980 and January 1, 1982 because in 1981, prior to its withdrawal, Schlitz continued to make contributions to the Plan. Endorsing this argument, the Seventh Circuit suggested that Congress did not necessarily leave a gap in funding because during the year of withdrawal, an employer makes contributions to the plan. In some cases, those contributions actually may reduce the amount of a plan's unfunded vested benefits between the end of the prior plan year and the date of withdrawal. *Jos. Schlitz Brewing Co.*, 3 F.3d at 1004. The Seventh Circuit acknowledged that in other cases the plan's underfunding could actually increase before the withdrawal. *Id.* Typically, current contributions in an ongoing plan are first used to pay the plan's current costs, then to pay the interest on unfunded liabilities and finally, to reduce the amount of unfunded liabilities. It is, therefore, most likely that in plans experiencing funding problems, the regular contributions by employers will not reduce funding deficiencies during that portion of the year prior to withdrawal.

According to the Seventh Circuit, "the law of large numbers" eventually evens these things out for the plan but not for the withdrawing employer. To the extent the "law of

large numbers" imposes a greater liability on the remaining employers or creates a greater potential for underfunding, it is inconsistent with the allocation of risk intended by Congress and the clear intent and purpose of MPPAA articulated by Congress—protecting the plan and its remaining employers. *Laborers Health and Welfare Trust Fund*, 484 U.S. at 545. Congress intended that the withdrawing employer be fully responsible for its allocated share of the unfunded benefits. Accordingly, the Seventh Circuit's perfunctory analysis should be rejected.

Rather than focusing on the potential adverse impact on the Plan or remaining employers and beneficiaries, the Seventh Circuit focused on the perceived fairness to Schlitz. The Seventh Circuit based its holding in part on its observation that Schlitz was not liable for one penny until it withdrew from the Plan and received a notice of liability. *Jos. Schlitz Brewing Co.*, 3 F.3d at 1004. This observation completely ignores the structure and design of ERISA and MPPAA as well as the nature of Schlitz' obligations. Until it withdrew from the Plan, Schlitz was required to make regular monthly contributions to the fund created by the Plan. The amount of these contributions was established according to the Plan by both the collective bargaining agreement and ERISA funding requirements. When Schlitz' obligation to make contributions to the Plan ceased under the terms of the Plan, the collective bargaining agreement and applicable labor-management relations laws, MPPAA began to dictate the amount, frequency and duration of Schlitz' required contributions to the Plan.

An employer's liability for these unfunded vested benefits arises out of the employer's pre-existing obligations and does not magically appear on the date the employer withdraws. *Huber*, 916 F.2d at 95. MPPAA merely dictates a new schedule of payments for the liability and limits the



withdrawing employer's future payments to only those required to amortize its allocated share of the unfunded vested benefits as of a date certain. This Court has noted: "MPPAA merely requires a withdrawing employer to compensate a pension plan for benefits that have already vested with the employees at the time of the employer's withdrawal." *Gray*, 467 U.S. at 734.

It is also important to keep in mind that withdrawal liability represents the present cash value of the employer's share of the unfunded vested benefits as of a certain date. *Concrete Pipe & Prods., Inc.*, 113 S.Ct. at 2264. In other words, it is an amount necessary to provide sufficient funds to pay at some time in the future the vested benefits, as if that amount were deposited in an account earning interest on that day. Congress does not require plans to calculate the present value of the unfunded benefits allocated to a withdrawing employer as of the date of withdrawal. Instead, it instructs plans to determine the present cash value as of the last day of the plan year preceding withdrawal.[20] Obviously, until an employer actually makes payments, the plan cannot start to earn interest on the funds.

If an employer withdraws early in a plan year and the plan makes the calculation and demand quickly, the payments may start in the first quarter of the plan year of withdrawal. Under such circumstances, based upon the Plan's reading of section 4219(c)(1)(A)(i), a plan might actually recover more than necessary to fully fund the amount of unfunded vested benefits allocated to an employer because the actual payment is made before the date of the presumed first payment. On the other hand, if the

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[20] Regardless of whether a withdrawal occurs, the plan must calculate the plan's liabilities at least once a year. 29 U.S.C. § 1082(c)(9).

employer withdraws near the end of a plan year or it takes some time for the plan to complete its calculations, the actual first payment may not occur until well into the plan year following the year in which the withdrawal occurs. Under those circumstances, even under the Plan's reading, a plan would not recover the full amount necessary to fund the unfunded vested benefits allocated to that employer because the actual payment would be received after the presumed first payment.

Moreover, if, as the Fourth and Seventh Circuits have held, a plan is not allowed to include accrued interest from the date used to calculate the amount of the unfunded vested benefits allocable to an employer until the date of the presumed first payment, the gap between the liability and the funding is even larger. If there is a gap, it must either be eliminated by the remaining employers or be directly absorbed by the plan's participants and beneficiaries in the form of lost benefits. While the potential exists for a gap in funding, if an employer withdraws late in a plan year, Congress did not intend to expand that potential gap by excluding accrued interest from the first payment in the presumed schedule.

Finally, in addition to administrative convenience, by providing a uniform rule which does not depend upon the date of withdrawal or the date of actual first payment for determining the number of payments necessary, Congress reduced the potential for abuse by either withdrawing employers or the plan, and established a risk allocation which is consistent with the goals of the legislation enacted. If interest ran only from date of withdrawal to the presumed first payment date, an employer could accelerate or postpone withdrawal depending upon whether the amount of its regular contribution was more or less than the amount of interest which would apply. If interest accrued



between the date of withdrawal and the date of actual first payment, a plan could delay making its demand, thereby increasing the amount of interest imposed on the withdrawing employer. Congress eliminated the potential for these tactics. Regardless of when the withdrawal or actual first payment occurs, interest is included in the first payment in the presumed schedule. When correctly considered in the context of the design and the scheme of ERISA and MPPAA, it is clear that Congress intended to ensure that a withdrawing employer fully fund the amount of unfunded vested benefits allocated to it and, thus, intended to include interest for the period from the date used to calculate the employer's allocable share of the unfunded vested benefits until the date that amount was fully funded.

## III. THE READING OF SECTION 4219(c)(1)(A)(i) URGED BY SCHLITZ VIOLATES A CARDINAL RULE OF STATUTORY CONSTRUCTION.

It is an elementary rule of statutory construction that a court should give effect, if possible, to every clause and word of a statute. *Moskal v. United States,* 498 U.S. 103, 108 (1990); *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985). In *Huber*, the court relied upon this rule to conclude that Congress intended to include interest on the amount from the last day of the plan year prior to withdrawal until the first day of the plan year following the withdrawal. 916 F.2d at 97.

Congress provided that the period of years necessary to amortize the amount in level annual payments be "calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year." 29 U.S.C. § 1399(c)(1)(A)(i). The court in *Huber* explained that

this method of calculation is similar to an immediate annuity rather than an annuity due. 916 F.2d at 98. The court in *Huber* explained that the first payment of an annuity due is made at the beginning of the interval and, therefore, is applied entirely to principal. On the other hand, the first payment of an immediate annuity is made at the end of the payment interval and, therefore, includes interest for that interval. 916 F.2d at 98. Congress' use of the immediate annuity concept is consistent with the natural and ordinary meaning of the term "amortize" as used in this section of the statute. *See* Argument Section I *infra*.

Moreover, the court in *Huber* concluded that the clause used by Congress would have no significance unless it was construed to require that interest for the first interval be included in the first payment in the presumed payment schedule. The court noted that if Congress had not intended to include interest in the first payment, it could have simply provided that the presumed payment schedule should be calculated as if payments were made annually. *Huber*, 916 F.2d at 97. The presumed payment schedule would then show the first payment to be made 60 days after demand and the second payment made on the same day one year later. Congress also could have provided that the first payment be presumed made on the first day of the plan year in which the withdrawal occurs, the day after the date used for calculating the amount. Congress did not use six words to direct the calculation to be made "as if payments were made annually." Instead, Congress used 42 words to describe carefully how the calculation should be made and designated the presumed first payment a year and a day after the date used to fix the amount allocated to the employer. This Court has often stated that "courts must presume that a legislature says in a statute what it means



and means in a statute what it says there." *Connecticut Nat'l Bank*, 112 S.Ct. at 1149.[21]

## IV. THE LEGISLATIVE HISTORIES OF ERISA AND MPPAA IN GENERAL AND SECTION 4219(c)(1)(A)(i) IN PARTICULAR CONFIRM THAT INTEREST ON THE AMOUNT OF UNFUNDED VESTED BENEFITS ALLOCATED TO SCHLITZ ACCRUES FROM THE DATE USED TO DETERMINE THE AMOUNT.

There is a wide range of opinion about the usefulness of legislative history materials in attempting to glean the

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[21] Schlitz has erroneously attempted to rely on another rule of statutory construction in support of its interpretation of the MPPAA section at issue. This Court has recognized that, provided the interpretation of an administrative agency is not contrary to the express intent of Congress, courts will accord deference to a reasonable statutory interpretation by an administering agency. *Estate of Cowart*, 112 S.Ct. at 2594. In the *Huber* case, the PBGC submitted an amicus brief arguing that the intent of Congress on this issue is not clear but that because Congress was not explicit, it must not have intended for inclusion of interest for the period at issue. 916 F.2d at 96. Because the court found the PBGC's position inconsistent with the intent of Congress, the court in *Huber* rejected it. 916 F.2d at 97. In the Seventh Circuit, Schlitz cited the PBGC's position in *Huber* as support for its argument. To date, the PBGC has not taken any position in this case. In fact, since its position was rejected in *Huber* it has not taken any litigation position on this issue or issued any regulations relating to this issue. The Seventh Circuit refused to give any deference to the PBGC's litigation position in *Huber* which was not supported by regulations, rulings or administrative practice. *Jos. Schlitz Brewing Co.*, 3 F.3d at 1003. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (deference to agency's litigating position is inappropriate). The Seventh Circuit noted that, in light of the PBGC's silence following *Huber*, it cannot be sure whether the PBGC continues to maintain the interpretation set forth in *Huber*. *Jos. Schlitz Brewing Co.*, 3 F.3d at 1003. For the reasons articulated in *Huber* and by the Seventh Circuit, this Court should not accord any deference to the litigation position of the PBGC expressed in *Huber*.

intent of Congress. Although the Plan believes that it is not necessary to resort to such sources in order to derive Congress' intent in this case, as this Court has observed, inquiry benefits from reviewing all available information rather than ignoring it. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 2485, n.4 (1991). In this case, the legislative history confirms that Congress intended the result urged by the Plan.

Throughout this Brief the Plan has noted the findings and purpose of ERISA and MPPAA as well as the legislative history relating to those statutes. This Court has repeatedly and consistently recognized that the legislative history of ERISA and MPPAA makes it clear Congress intended to protect plan participants and beneficiaries and to avoid imposing additional burdens on employers which remained in the multiemployer plan. This legislative history is consistent with the Plan's reading of section 4219(c)(1)(A)(i).[22]

A review of the changes from the Senate Bill and the House Bill to the enacted version of this section reveals Congress considered, but rejected, limiting interest to the period after withdrawal. Senate Bill 1076 introduced April 9, 1979 fixed withdrawal liability as of the last day of

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[22] The court in *Huber* noted that an example of how withdrawal liability is calculated, including the number of necessary payment periods, is contained in several committee reports. 916 F.2d at 98 n.30. The results achieved in the example can only be recreated if interest for a full year is applied to the first presumed payment. The court in *Huber* concluded that, because of the complexity of the calculations necessary to realize that interest was included in the first period and the lack of any direct testimony about how the example was prepared, it is unlikely that the example is a good indication of congressional intent on this issue. 916 F.2d at 98 n.30. The example, however, is consistent with the plain meaning of the term "amortize."



the plan year ending prior to withdrawal. Section 4201(e)(5) of that Senate Bill provided that interest shall be charged from the date of the withdrawal. S. 1017, 96th Cong., 1st Sess. (April 9, 1979). Senate Bill 1076, therefore, clearly would have limited the application of interest to the period after the date of withdrawal.

In contrast, the parallel House Bill that became MPPAA, H.R. 3904, utilized the last day of the plan year in which withdrawal occurs to calculate the amount of unfunded vested benefits allocated to a withdrawing employer, and provided that the amortization schedule be calculated as if the first payment were made on the first day of the plan year following withdrawal. Report of the House Committee on Education and Labor, H.R. Rep. No. 96-869 pt. 2, at 15 (1980). Thus, the House Bill contemplated essentially no lapse of time between the date used to determine the amount and the date of the first presumed payment. The House Bill did not need to address interest for any gap period.

The version of MPPAA enacted appears to be a hybrid of the Senate and House Bills. The combination of the House and Senate Bills is consistent with the stated policy of MPPAA because it provides the greatest protection to the plan and its beneficiaries. The enacted version adopts the administratively convenient Senate concept of making the calculation based upon the amount of the unfunded benefits as of the last day of the plan year prior to withdrawal. It also adopts the House Bill's protection of full funding of the amount by eliminating the limitation on interest found in the Senate's Bill. Although the legislative history does not reveal the reasons for the enacted version or express why the Senate's restriction on interest was eliminated, when Congress deletes limiting language from a draft version of a statute, it may be presumed the limitation was not

intended. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S.Ct. 517, 540 (1993).

## CONCLUSION

The withdrawal liability provisions of MPPAA are designed and structured to guarantee that all vested benefits promised to employees in multiemployer pension plans will be paid. Section 4219(c)(1)(A)(i) is one of the provisions designed to ensure full funding of the vested benefits. Congress clearly required a withdrawing employer to make sufficient annual payments to a multiemployer plan to fully fund the amount of unfunded vested benefits allocated to that employer. To achieve this goal, Congress required that all payments, including the first payment in the presumed payment schedule, which is created to determine the period over which payments must be made, be attributed in part to interest accrued on the amount of unfunded benefits allocated to the withdrawing employer.

In this case, the Seventh Circuit ignored the text of section 4219 as well as the statutory scheme of ERISA and MPPAA, and erroneously excused Schlitz from making the number of payments required by Congress. That court, without sufficient analysis of the legislation enacted by Congress, shifted the risk of underfunding for the allocated vested benefits to the Plan participants, beneficiaries and the remaining employers. The Plan respectfully requests that this Court reverse the judgment of the Seventh Circuit and hold that in Section 4219(c)(1)(A)(i) Congress requires a withdrawing employer to make payments which include interest from the date used to determine the amount of the employer's share of the unfunded vested benefits, the last day of the plan year prior to withdrawal, until the date the presumed first payment is made, the first day of the plan year after withdrawal. Further, the Plan requests that the



Court vacate the judgment of the Seventh Circuit on this issue and remand the case to the Seventh Circuit with instructions that it remand the case to the District Court for the purpose of calculating Schlitz' total additional liability as of that date, including pre-judgment and post-judgment interest as previously awarded by the District Court, and entering judgment in favor of the Plan in that amount.

Respectfully submitted,

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